according to Mr. Suthers. In addition, he testifies that a CLEC orders a UNE with particular specifications to provide service to the CLEC's end user customer. On the other hand, he points out that Ameritech determines how it will provide service and over what facilities in fulfillment of a retail or wholesale/resale customer's request for service.

Mr Suthers further states that the rates, terms, and conditions for retail services and UNEs are dramatically different. Rates for UNEs, he contends, are set at TELRIC, plus an allocation for some shared and common costs. Current rates, according to Ameritech witness Florence, do not include any allocation for any construction work in excess of simple dispatch. By contrast, Mr. Suthers testifies that rates for Ameritech's retail services are set a level above LRSIC, which Mr. Florence states is merely a price floor. Except for the nine situations described in Ameritech's "retail special construction tariff," Mr. Suthers reports that retail rates recover special construction costs by spreading them over all customers through contribution. The same is not true of TELRIC rates, he asserts, which seek to establish the forward looking costs of each individual element in a hypothetical network, and, Mr. Florence argues, do not recover any special construction costs.

In developing the TELRIC rate for UNEs, Ameritech witness Florence observes that the Commission rejected the inclusion of any residual cost component in UNE prices; a distinction which Ameritech contends is crucial in the discrimination analysis. As stated earlier, Mr. Florence describes residual costs as representing the "gap" between overall retail revenues (or UNE revenues, in the case of UNEs) and the sum of the LRSIC rates (or TELRIC rates) plus shared costs plus common costs of Ameritech's retail services (or UNEs). In his direct testimony, Mr. Florence states that this "gap" represents costs such as those related to the capacity of network equipment and facilities utilized at levels less than those assumed in the LRSIC and TELRIC studies, capital costs of common assets, and obsolete technology still in use in Ameritech's network. In his surrebuttal testimony he adds that the residual includes the economic costs incurred in retail special construction situations that are not assessed through specific special construction charges. Mr. Florence insists that the exclusion of residual costs from TELRIC is very important because it implicitly excludes any recovery of plant construction and engineering beyond the costs included in Ameritech's TELRIC studies. In contrast, he asserts that costs relating to complex dispatch and line conditioning fall into the residual category, which is recovered through contribution generated by all of Ameritech's retail services. Therefore, Ameritech maintains that it is recovering the same costs, through contribution, from retail customers which it seeks to recover from CLECs, through special construction charges. In response to Mr. Starkey's allegations that the residual is superfluous to this proceeding and is being used to merely mislead the Commission, Mr. Florence counters that it is Mr. Starkey who is really trying to mislead the Commission by characterizing the residual as "phantom costs" that either do not exist or if they do exist, have no relevance to this proceeding.

Both the FCC and this Commission have recognized that UNEs are not comparable to retail services and that CLECs are not comparable to retail end users, according to Mr. Suthers. He relies on paragraph 141 in the FCC's order in In re Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, CC Docket 97-137, FCC 97-298 (August 19, 1997), and paragraph 87 in In re Application of BellSouth Corp., CC Docket 98-121, FCC 98-271 (October 13, 1998), for the proposition that the provisioning of UNEs has "no retail analogue" and that, therefore, the only question under the TA96 is whether the access provided to the UNE gives the CLEC a meaningful opportunity to compete. Similarly, Mr. Suthers claims that this Commission recognized the lack of comparability between retail local exchange service and UNEs in its orders in Docket Nos. 96-AB-003/004, concerning AT&T Communications of Illinois, Inc. ("AT&T") and Ameritech's interconnection agreement arbitration, and Docket No. 98-0198, a complaint filed by AT&T against Ameritech.

In short, Mr. Suthers claims that the proper comparison is not between UNEs and retail service, but between how Ameritech treats a CLEC and how it treats other CLECs, itself, and its affiliates with respect to UNEs. If they are treated alike, he argues that the means by which they recover costs from end users is not of any competitive significance. Mr. Suthers testifies that Ameritech treats CLECs and its advanced services affiliate, Ameritech Advanced Data Services ("AADS"), the same. As for how Ameritech treats itself, Mr. Suthers states that Ameritech bears the cost of all construction services that it provides for itself, and therefore is in the same competitive position as a CLEC.

Moreover, Ameritech maintains that equating the purchase of UNEs with the purchase of retail services would not be sound policy because it would lead to absurd results. As an example of such results, Mr. Suthers states that if UNEs and retail service were "like services" for discrimination analysis, the price of the UNE platform would have to be identical to the price of retail services, and individual UNEs would have to be priced accordingly. Either retail customers, he continues, would be able to buy local exchange service at a TELRIC rate or CLECs would be required to pay retail rates.

With respect to specific allegations of discrimination in the xDSL market raised by Rhythms and Covad, Mr. Suthers states that Ameritech treats all CLECs identically with respect to special construction, including AADS. He states that Ameritech does not even offer xDSL services; such services are provided only through AADS, which he claims faces exactly the same special construction charges as Rhythms and Covad. Ameritech could not confirm or deny that it had provided service to a customer without assessing special construction charges after a CLEC had attempted to provide the same service to the same customer but declined to do so allegedly due to exorbitant special construction charges. Ameritech also denies approaching end users with offers for service after CLECs have been unable to provide service due to special construction charges. Ameritech contends that its units dealing with CLECs and retail end users do not communicate with one another.

As for ISDN service, which Ameritech does provide, Mr. Suthers responds to allegations that Ameritech has imposed loop conditioning charges on Rhythms and Covad when it provided retail ISDN service without such charges by repeating that UNEs and retail services are not comparable for purposes of a discrimination analysis. Both Ameritech and CLECs, Mr. Suthers asserts, sustain the same loop conditioning costs to serve a given customer; CLECs, he states, must then decide how to structure their own retail rate. As long as the costs sustained by Ameritech and the CLEC for providing ISDN service are identical, Mr. Suthers argues that there is no "discrimination" that would affect market forces. This is all the FCC requires, because that is all that is necessary to assure competitive parity under paragraph 315 of the First Report and Order, according to Mr. Suthers. In its Reply Brief, however, Ameritech states that although it does not agree that retail services and UNEs are comparable, it does not object to charging its retail customers for conditioning ISDN lines on the same basis that it imposes such charges on CLECs.

As indicated above, Ameritech indicates that in the future it will assess flat TELRIC based special construction charges for each instance of loop conditioning. Such is also a condition of the FCC's order CC Docket No. 98-141 approving the merger of SBC and Ameritech. The FCC imposed the condition at paragraph 375 of its order, which reads as follows:

> 375. *Loop Conditioning Charges and Cost Studies.* Numerous parties allege that the rates charged by incumbents for conditioning loops are unreasonably high and preclude competitors from offering advanced services to many potential customers, particularly residential and small business customers where the conditioning costs may exceed prospective net income. This condition is designed to ensure that SBC/Ameritech will not erect a barrier to the competitive deployment of advanced services by charging excessive rates for loop conditioning. Within 180 days of the merger's closing, SBC/Ameritech will file with state commissions cost studies and proposed rates for conditioning loops used in the provision of advanced services, prepared in accordance with the methodology contained in the [FCC's] pricing rules for UNEs. Pending approval of state-specific rates, SBC/Ameritech will immediately make available to carriers loop conditioning rates (provided that they are greater than zero) contained in any effective interconnection agreement to which an SBC/Ameritech incumbent LEC is a party, subject to true-up. In addition, subject to true-up, SBC/Ameritech will impose no loop conditioning charges on loops less than 12,000 theoretical feet during this period. Moreover, advanced services providers will have a choice in the amount and extent of conditioning on any particular loop.

Initially, Staff proposed that the Commission adopt as interim loop conditioning rates the rates contained in the interconnection agreement between SWBT, a SBC subsidiary, and BroadSpan Communications ("BroadSpan"). The rates are for conditioning loops between 12,000 and 17,500 feet for xDSL service and are as follows:

Removal of Repeater Option	$289.51
Removal of Bridge Tap Option	$484.19
Removal of Load Coil Option	$797.78

Staff believes that, rather than charging on a case-by-case basis, Ameritech should be required to file tariffs for interim rates, subject to true-up once the Commission approves final loop conditioning rates. If the Commission decides to adopt interim rates in this proceeding, Mr. Florence recommends that the Commission adopt those contained in the BroadSpan agreement rather than those suggested by Mr. Starkey and later supported by Staff. Furthermore, Mr. Suthers states that Ameritech does not object to updating its tariffs to reflect the BroadSpan rates. Mr. Suthers also acknowledges that the adoption of interim rates for loop conditioning will eliminate the concerns of Staff and intervenors regarding the certainty and predictability of loop conditioning costs. In any event, however, in light of the true up requirement for interim rates, Mr. Florence states that this issue is not of central importance to Ameritech.

The interim rates proposed by Mr. Starkey are found in a Texas Arbitration Award in Docket Nos. 20226 and 20272 (released November 1999).[48] In these dockets, the Public Utility Commission of Texas ("PUCT") approved specific line conditioning rates to be included in the interconnection agreements between SWBT and Rhythms and Dieca Communications, Inc. (a/k/a Covad), respectively. The rates approved by the PUCT are as follows:

	Initial	Additional
IV. Removal of Load Coils		
- Loop < 12,000 kft.	$0.00	$0.00
- 12,000 kft. < Loop < 18,000 kft.	$25.66	$22.83
- 18,000 kft. < Loop	$40.55	$34.89
V. Removal of Bridged Tap		
- Loop < 12,000 kft.	$0.00	$0.00
- 12,000 kft. < Loop < 18,000 kft.	$17.62	$14.79
- 18,000 kft. < Loop	$24.46	$18.81
VI. Removal of Repeaters		
- Loop < 12,000 kft.	$0.00	$0.00
- 12,000 kft. < Loop < 18,000 kft.	$10.82	$9.41
- 18,000 kft. < Loop	$16.25	$13.42

[48] The Texas decision is affixed to Staff Ex. 1.2 as Attachment 3.

Mr. Suthers objects to incorporating the PUCT rates into Ameritech's tariff because the Texas rates are already available (subject to true-up) to any CLEC that wishes to execute an appropriate amendment to its interconnection agreement. Ameritech further states that the FCC order allows each CLEC to determine for itself which loop conditioning rates it would like to adopt. State commissions, Ameritech contends, have not been directed to choose a single rate on behalf of all CLECs. In addition, Mr. Suthers argues that Mr. Starkey provides no basis for finding the Texas interim rates to be "just and reasonable." The mere fact that certain rates have been adopted on an interim basis in Texas provides no basis for imposing those rates in Illinois, according to Mr. Suthers.

Ameritech also opposes the use of the PUCT rates on the grounds that they are too low. Ameritech's witnesses contend that the Texas Arbitration Award assumed incorrectly, with regard to loops between 12,000 feet and 18,000 feet in length, that 50 loops would be conditioned at a time, at no additional cost beyond the cost of conditioning a single loop. Mr. Florence asserts that this has the effect of spreading the outside plant engineering and cable splicing cost portion of the total conditioning costs over a value of 50, a reduction of 98% from the costs originally submitted by SWBT. For loops greater than 18,000 feet, he states that a value of 25 loops was assumed resulting in a 96% reduction. In fact, Mr. Suthers maintains, load coils and other devices are removed one loop at a time to avoid degrading voice service over loops that are not being data conditioned. As a result, he states that the Texas loop conditioning rates do not reasonably reflect actual costs of performing that work and are clearly not compensatory. Mr. Florence adds that SWBT argued that it should not be required to have its cost study reflect conditioning for more loops than the CLEC requests. He further states that at an open meeting held January 27, 2000, the PUCT stressed that the loop conditioning rates it ordered are interim, and would be re-evaluated when SWBT files its loop conditioning cost study.

Some parties have also alleged that the up-front nature of Ameritech's special construction charges have a discriminatory impact on CLECs. Ameritech argues that up-front charges are entirely appropriate. Since it incurs the costs associated with special construction activities up-front, Ameritech maintains that it should recover them up-front. Mr. Suthers states that when deciding to serve a customer through UNEs, all CLECs must decide whether to make the investment necessary to serve that customer, or whether it would make more sense to serve the customer through resale or through facilities obtained from some other source. Ameritech faces that same choice, according to Mr. Suthers, whenever it has to decide whether to invest in the special construction needed to serve a retail customer.

In contrast, Mr. Suthers contends that requiring Ameritech to recover special construction costs through increased TELRIC rates or some deferred payment mechanism could skew investment incentives and lead to inefficient investment decisions by CLECs. If a CLEC does not have to pay for such costs up-front, it will have a much greater incentive to rely on UNEs, rather than resale or non-Ameritech facilities (including its own facilities), even when those other options would be more efficient in the long run, according to Mr. Suthers. He argues that this is because the lack of an up-front charge sends the wrong price signals and prevents CLECs from considering the true costs for serving that customer through UNEs.

Moreover, Ameritech claims that denying up-front recovery could prevent it from ever recovering all of its special construction costs, even though it is allegedly entitled to such recovery under the TA96, paragraphs 382 and 384 of FCC's First Report and Order, paragraphs 193 and 194 of the FCC's *UNE Remand Order*, and the U.S. Constitution. Mr. Suthers explains that CLECs lease UNEs on a month-by-month basis and have no obligation to continue the lease for any set period. Any of them could order a loop that includes special construction, use that loop for only a few months, and then decide it does not want the loop anymore or switch the customer to new facilities it has constructed, according to Mr. Suthers. In either case, Ameritech asserts that the CLEC would never pay the full unbundling costs it had imposed on Ameritech.

Ameritech further claims that use of an up-front charge is also consistent with the FCC's position in paragraph 334 of its *First Report and Order* that UNEs come with risks as well as benefits, and each CLEC must make its own up-front investment decision based on the costs of the UNE. Ameritech states that the FCC recognized that some new entrants will be unwilling to bear the financial risks of entry by means of UNEs and will choose to enter local market through resale. The CLECs try to avoid this market reality by forcing Ameritech to bear the financial risks associated with special construction costs either by not recovering those costs at all or recovering them through a mechanism that does not guarantee full reimbursement, according to Ameritech. In effect, Mr. Suthers claims that the CLECs want Ameritech to guarantee the profitability of each of their customers.

In addition, Mr. Suthers argues that there is no evidence that CLECs have no choice but to require their retail customers to immediately bear the entire up-front special construction charges, as they allege. The CLECs, like Ameritech, could spread their up-front costs across customers and over time, through their own retail rates, according to Mr. Suthers. The CLECs also contend that up-front charges are improper because they require CLECs to bear the entire cost of a facility, even when they seek to use only a portion of the facility. Mr. Suthers counters that Ameritech has no guarantee that other CLECs would seek to use the same facility, and Ameritech itself generally would not use the new facility, because it has its own integrated facilities for that purpose. If costs are not recovered from the CLEC imposing those costs, he contends that Ameritech would be forced to bear the risk that they would not be recovered at all; which, he opines, would violate the TA96 Act and the FCC's *First Report and Order*.

In any event, Ameritech recognizes that up-front charges are not the only possible means of recovering special construction costs. If up-front charges are the problem, Ameritech states that the answer is to change the method of cost recovery, not deny recovery altogether.

B Staff's Position

Contrary to Ameritech's position, Staff argues that the provisioning of an unbundled loop to a CLEC, so that the CLEC may provide service to its end users, is comparable for purposes of analyzing special construction charges to Ameritech provisioning service to its own retail customers. Staff witness Phipps asserts that he has shown that UNEs provided to CLECs and retail service provided to Ameritech's retail end users include very similar cost components, with a few minor differences, and are used to ultimately provide a similar service to similar customers. Specifically, he states that regardless of whether Ameritech provisions service to a retail customer or a CLEC, it assesses two initial non-recurring charges (service order charge and line connection charge) and a monthly recurring charge. Therefore, Mr. Phipps contends, the end users of both Ameritech and the CLEC will incur very similar recurring and non-recurring charges (since the CLEC will pass these through to its end users). Since the cost/rate structure as well as the ultimate service being provided are very similar, it is logical to compare the two for the purpose of analyzing special construction charges, according to Mr. Phipps.

Although Ameritech disagrees that these situations are comparable, Mr. Phipps maintains that the comparison that Ameritech relies on to support its assertion is flawed. While Ameritech compares the retail end user of Ameritech and the CLEC when analyzing special construction charges, Mr. Phipps asserts that the correct comparison is the ultimate service requested by the end-use customers of both the CLEC and Ameritech. Since Ameritech and CLECs are competing against each other to provide equivalent services to the same end users, he states that the service provided to these end users must instead be compared.

Mr. Phipps relies upon his understanding of Section 13-505.2 of the Act to support his position that assessing special construction charges on CLECs but not similarly situated retail end users constitutes discrimination. Section 13-505.2 states:

> Nondiscrimination in the provision of noncompetitive services. A telecommunications carrier that offers both noncompetitive and competitive services shall offer the noncompetitive services under the same rates, terms, and conditions without unreasonable discrimination to all persons, including all telecommunications carriers and competitors. A telecommunications carrier that offers a noncompetitive service together with any optional feature or functionality shall offer the noncompetitive service together with each optional feature or functionality under the same rates, terms, and conditions without unreasonable discrimination to all persons, including all telecommunications carriers and competitors.

Mr. Phipps asserts that it does not appear that Ameritech has applied its tariff under the same terms, rates, and conditions to wholesale customers (its competitors) as to its own retail customers; which he believes constitutes a violation of the Act.

As for particular instances of alleged discrimination, Mr. Graves reports that in response to a Staff data request, Allegiance indicated that on September 9, 1999 it learned from Ameritech that a particular UNE request would require payment of $2,318.39 in special construction charges before an order could be installed. Allegiance further stated that after the due date was moved by Ameritech to October 1, 1999, Allegiance cancelled to the order. On September 13, 1999, however, the end user customer acquired the same service from Ameritech, one day after placing the order with Ameritech, according to Allegiance. Allegiance claimed that Ameritech had previously told it that the special construction would delay installation of the UNE by three weeks. Mr. Graves states that Staff verified this statement through a telephone call to the end user customer. According to Mr. Graves, the customer indicated to Staff that he was not charged a special construction charge, although he was charged for inside wiring. This scenario is listed as No. 18 on Proprietary Attachment 9 to Staff Ex. 2.0.

Mr. Graves second example concerns item No. 6 on Proprietary Attachment 9 to Staff Ex. 2.0. In this situation, Mr. Graves asserts that NextLink chose not to provision service to a customer because of $3,110.09 in special construction charges for what Ameritech described as "[f]acility charges for provisioning unbundled ISDN loops where no facilities exist; requires placing and splicing aerial cable and a terminal." Through a telephone conversation with the end user customer, Mr. Graves reports that Staff determined that when the customer subsequently ordered service from Ameritech no special construction charges were assessed.

Mr. Graves last example regards an order for ISDN service by a NorthPoint customer. According to Mr. Graves, in order to provide the requested UNE, NorthPoint stated in its response to Staff's data request that Ameritech informed NorthPoint that the special construction described as "[t]he removal of load coils and provide non-loaded pairs" was necessary and would cost $4,334.00. Mr. Graves states that NorthPoint declined the charges and cancelled its customer's order. Upon calling the end user customer, he asserts that Staff learned that the customer had two ISDN lines installed by Ameritech without special construction charges being assessed. Mr. Graves avers that ISDN lines require the same conditioning as DSL lines. This situation is listed as item No. 1079 on Proprietary Attachment 9 to Staff Ex. 2.0.

In each of his examples, Mr. Graves contends that it appears that special construction charges were applied in a discriminatory manor. Another problem with these charges, he maintains, is that there is no way to verify that the costs were needed or that the assessments accurately reflected the cost incurred.

Since it believes that the provisioning of UNEs and retail service are comparable and that Ameritech has discriminated against CLECs in its assessment of special construction charges for loop conditioning, Staff advocates the adoption of interim loop conditioning rates in this proceeding. As indicated earlier, Staff originally proposed that the Commission adopt as interim conditioning rates those found in the SWBT/BroadSpan interconnection agreement. Based on his review of Mr. Starkey's testimony, however, Mr. Graves now recommends adoption of the interim loop conditioning rates approved by the PUCT. Mr. Graves states that these rates appear to qualify under the FCC requirements as "rates . . . contained in any effective interconnection agreement to which an SBC/Ameritech incumbent LEC is a party." As Ameritech and SBC have agreed to offer such rates on an interim basis pending approval of state specific rates and subject to true-up as a condition of their merger, Mr. Graves considers them appropriate interim rates for loop conditioning in Illinois.

Mr. Graves notes that Ameritech witness Suthers argues that the PUCT rates are not "just and reasonable." In response, Mr. Graves asserts that Ameritech has provided very little justification of its own conditioning rates, aside from the proprietary figures Ameritech offered in Docket No. 99-0525 for its "plant labor" and "engineering labor" costs.[49] Mr. Graves reports that these costs appear to be similar to costs developed in cost studies submitted in Docket No. 98-0385.[50] These studies are attached to Staff Ex. 1.2 as Proprietary Attachments 1 and 2. Mr. Graves discusses the cost comparisons that may be drawn among the proprietary costs in Staff Ex. 1.2.

Staff witness Graves further states that he is concerned that Ameritech's Fully Distributed Cost ("FDC") already contains shared and common loading factors. Applying a particular proprietary factor to the FDC should not have occurred, according to Mr. Graves, because it would overstate shared and common costs, basically accounting for the costs twice. He concludes that it is questionable whether Ameritech should charge common costs at all for loop conditioning. Where special construction is warranted under condition C of Ill. C. C. No. 20, Part 2, Section 5, Original Sheet No. 1, he maintains that Ameritech should only charge CLECs for excess construction cost over that which Ameritech would have ordinarily incurred. In other words, Mr. Graves states that Ameritech should only charge the incremental cost of doing the work. This incremental cost would exclude common costs because common costs will be incurred if the special construction is done or not, according to Mr. Graves. Thus, he contends, common costs are costs that Ameritech would have ordinarily incurred.

Nor does Mr. Graves find Ameritech's time estimates to complete work for conditioning loops reasonable. After analyzing items No. 3 and No. 85 listed in Proprietary Attachment 9 to ICC Ex. 2.0, Mr. Graves concluded that time involved with the former seemed excessive when compared with the latter. He further states that

[49] See Attachment A to Staff Ex. 1.00 in Docket 99-0525.

[50] According to Mr. Graves, Docket No. 98-0385 involved accusations by the Cable Television and Communications Association of cross-subsidization of Ameritech New Media's Cable operation by Ameritech; the case was withdrawn in 1999.

both of the time estimates result in far higher prices than that charged by Gallatin River Communications ("Gallatin"), another ILEC in Illinois. Mr. Graves reports that Gallatin charges $200 to condition a two-wire loop and that Gallatin's conditioning rate is all inclusive, meaning that it does not charge per bridge tap or per load coil removed.

Because the cost studies used to support the Texas rates are confidential, and thus not attached to the public version of the Arbitration Award, Mr. Graves states that he was not able to review the cost studies from a "just and reasonable" perspective. He adds, however, that the cost studies on which the Texas rates are based were provided by SWBT and are reported in the Arbitration Award to utilize TELRIC based methodology. Mr. Graves further notes that the studies were altered by the Texas Arbitrator in order to take into account the following factors: SWBT's internal practice is to condition at least 50 loops (a binder group) at a time for loops between 12,000 and 18,000 feet; SWBT's internal practice is to condition at least 25 loops at a time for loops greater than 18,000 feet; and charges for removal of bridge taps should not include re-installing bridge taps. Mr. Graves agrees with Ameritech that the effect of the first two findings was to lower the price of loop conditioning by allocating the cost of the conditioning equally among the 25 or 50 loops conditioned. He states that the third finding resulted in lowering the price for removing bridge taps. Mr. Graves asserts that it is also worth noting that the Texas Arbitrator found that loops less than 18,000 feet should no longer have load coils or repeaters attached to them, but nonetheless permitted SWBT to charge for conditioning loops less than 18,000 feet. He asserts that these adjustments were made to reflect the best practices of SWBT and seem reasonable to him. Mr. Graves also assumes that if those are in fact the most efficient practices, Ameritech should import them into its territory.

In any event, Mr. Graves states that the adoption of explicit rates for loop conditioning is important in order to give CLECs a reasonable opportunity to know how much and when they will be charged for conditioning of loops. Staff reminds the Commission that Mr. Suthers acknowledges that a tariffed rate would have these benefits. An explicit charge, he adds, will promote parity and eliminate controversy concerning whether Ameritech's advanced services affiliate is being charged the same rates as other CLECs for special construction. Mr. Graves maintains that a tariffed rate will also make loop conditioning charges easier for Ameritech to administer since it will not be forced to track and apply different rates to different CLECs that have opted into the BroadSpan rates as opposed to the Texas rates. He further contends that a tariff may be used by parties that have not yet entered Illinois in order to asses the financial viability of entry into the market.

With regard to Ameritech's final loop conditioning rates, Mr. Graves asserts that they must be TELRIC based and should not be tariffed as special construction charges. Moreover, he contends that they should be non-recurring charges specific to each removal of bridge taps, repeaters, and load coils in order to most accurately reflect the costs incurred by Ameritech.

Staff is also concerned about the up-front nature of Ameritech's special construction charges, but to a lesser extent than certain CLECs. Mr. Phipps begins his discussion of this issue by citing Mr. Starkey:

> To the extent possible, special construction charges should be recovered via monthly recurring, TELRIC based rates [...] to the extent that Ameritech believes it is incurring costs for which it is not being compensated via its current TELRIC based rates, its appropriate avenue of recourse is to conduct an unbundled loop study that does include those costs and submit that study to the Commission for approval. To the extent special construction activities concern adjustments to the Ameritech network for purposes of supporting either unbundled loops or retail loops, those expenses must be recovered from all parties that may use that facility over the facility's economic life [...] Ameritech's current policy of charging the entirety of the expense to the 'first man in' penalizes the first CLEC who encounters a facility, or a portion of the Ameritech network, that must be refashioned.[51]

Mr. Phipps concurs with Mr. Starkey's assessment under certain special construction instances, but does not agree in all cases. For example, assuming that there are no unbundled loops available in an IDLC environment and Ameritech must construct a separate parallel non-integrated facility, Mr. Phipps states that it would be improper for Ameritech to charge that requesting carrier for the entire facility up-front because (a) Ameritech could utilize that facility to provision service to other CLECs and retail customers and (b) Ameritech could double recover the costs of that facility by assessing an up-front charge as well as monthly recurring charges to recover the cost of the facility over its economic life. Mr. Phipps states that this example is analogous to Mr. Starkey's argument of penalizing the "first man in," a practice which he claims is specifically rejected by the FCC in paragraph 755 of its First Report and Order. In that paragraph, Mr. Phipps reports that the FCC determined that the costs of shared facilities should be recovered in a manner that efficiently apportions costs among users. In these instances, if recovery is allowed by the Commission, Ameritech should construct the facility and recover the cost from all CLECs using the facility via monthly recurring TELRIC based rates, according to Mr. Phipps.

However, in other instances, Mr. Phipps contends that it would be more appropriate for Ameritech to recover the cost of special construction via nonrecurring TELRIC based charges. Mr. Phipps lists four criteria which he believes should be used to determine when up-front charges are permissible:

1. The special construction activity is performed exclusively for the benefit of the requesting carrier;
2. The special construction activity is a "non-recurring" activity;

[51] Joint CLEC Ex. 1.0, pp42-43.

3. The special construction charge is not cost-prohibitive; and
4. The charges among retail customers and CLECs should be consistent.

These criteria, applied to loop conditioning, indicate that special construction charges for such work may be properly assessed as up-front charges, according to Mr. Phipps. Although he agrees with Mr. Starkey's assessment of up-front charges to the extent he applies it to costly, shared facilities, Mr. Phipps maintains that the above four criteria best determine whether to assess up-front special construction charges as opposed to recurring charges.

C. McLeod, Ovation, MCI WorldCom, and Allegiance's Position

McLeod, Ovation, MCI WorldCom, and Allegiance witness Starkey argues that allowing Ameritech to assess special construction charges only in situations wherein it would assess similar charges on its retail customers is the only way that Ameritech can be effectively precluded from disadvantaging its competitors who purchase UNEs *vis a vis* its own provision of retail services using those same network elements. Unless it is required to abide by this principle, Mr. Starkey contends that Ameritech will undoubtedly be tempted to continue following its obvious incentive to recover from its competitors costs that it does not likewise attempt to recover from its retail customers. Mr. Starkey cites proprietary information provided by Ameritech indicating that Ameritech assess special construction charges from its retail customers on far fewer occasions than it does so from CLECs[52] as evidence of Ameritech's discriminatory practices.

Mr. Starkey disagrees with Mr. Suthers that there are material differences between the purchase of a UNE and the purchase of a retail service. He asserts that Mr. Suthers' argument seems to be that Ameritech does not provide retail customers network elements; instead, Ameritech provides retail customers retail services. Hence, according to Mr. Starkey, it is Ameritech's position that when it provides a CLEC access to UNEs, this is the provision of an entirely different product and comparisons can not be made between this product and the services Ameritech provides its retail customers.

In response, Mr. Starkey claims that there is a major hole in Mr. Suthers' argument. He notes that the term "Network Element" included in Ameritech's tariff and throughout the majority of its interconnection agreements is capitalized. Mr. Starkey contends that this means that the term is not being used loosely; rather, it is being used consistent with a specific definition contained elsewhere in the interconnection agreement or elsewhere in applicable law. In this circumstance, Mr. Starkey states that the term "Network Element" is used as it is defined in Section 3 (29) of the TA96. Section 3 (29) states:

[52] See Joint CLEC Ex. 1.0, p.35.

> Network Element. – The term 'network element' means a facility or equipment used in the provision of a telecommunications service. Such term also includes features, functions, and capabilities that are provided by means of such facility or equipment, including subscriber numbers, databases, signaling systems, and information sufficient for billing and collection or used in the transmission, routing, or other provision of a telecommunications service.

What is important to note about this definition, Mr. Starkey avers, is that it describes a Network Element as a facility or equipment used in the provision of a telecommunications service. He notes that it does not suggest that Network Elements only support *unbundled* Network Elements. Under the construct of the TA96, Mr. Starkey asserts that Network Elements are the common "building blocks" upon which retail, wholesale, and UNE products are provided. He maintains that Ameritech deploys Network Elements (i.e., discrete components of its network), or combinations of Network Elements, to serve end user customers who order retail services. Likewise, he states that Ameritech is required by Section 251 of the TA96 to allow CLECs to access its Network Elements directly on an unbundled basis. Ameritech obviously employs its Network Elements, Mr. Starkey continues, to serve retail customers as well as CLEC customers. Hence, when Ameritech in its tariff or in its interconnection agreements agrees to provide a CLEC access to Network Elements on terms and conditions no less favorable than the terms and conditions under which it provides such elements to itself, its subsidiaries, affiliates, and any other person, it is agreeing to provide nondiscriminatory access to the discrete, "building block" facilities of its network, according to Mr. Starkey. For this reason, when Ameritech rejects a CLEC's order for an unbundled facility and requires the payment of special construction charges for purposes of accessing that facility, and it does not or would not follow a similar procedure when the facility (or Network Element) is used to provision a retail service, Mr. Starkey contends that Ameritech is in violation of its tariff and its many interconnection agreements.

McLeod, Ovation, MCI WorldCom, and Allegiance maintain that Ameritech's reliance on Iowa Utilities Board v. FCC is disingenuous. While Ameritech states, "Likewise, the Eighth Circuit has explained that nondiscrimination merely prevents an incumbent LEC from arbitrarily treating some of its competing carriers differently than others," the four CLECs argue that this statement is taken grossly out of context and occurs in the discussion of an entirely different issue -- the quality of the service provided. They contend that this discussion is not at all instructive on the discrimination issue for which it is cited by Ameritech.[53]

The four CLECs rely on paragraphs 218, 315, and 316 of the FCC's First Report and Order to support its position that service to CLECs and retail end users is

[53] McLeod, Ovation, MCI WorldCom, and Allegiance reference GTE South Inc. v. Morrison, 6 F.Supp.2d 517, 530, n. 10 (E.D.Va. 1998), which they assert similarly rejects an ILEC's out of context reliance on Iowa Utilities Board.

comparable:

> 218. Given that the incumbent LEC will be providing interconnection to its competitors pursuant to the purpose of the 1996 Act, the LEC has the incentive to discriminate against its competitors by providing them less favorable terms and conditions of interconnection than it provides itself. Permitting such circumstances is inconsistent with the pro-competitive purpose of the Act. Therefore, we reject for purposes of section 251, our historical interpretation of "non-discriminatory," which we interpreted to mean a comparison between what the incumbent LEC provided other parties in a regulated monopoly environment. We believe that the term "nondiscriminatory," as used throughout section 251, applies to the terms and conditions an incumbent LEC imposes on third parties as well as on itself. In any event, by providing interconnection to a competitor in a manner less efficient than an incumbent LEC provides itself, the incumbent LEC violates the duty to be "just" and "reasonable" under section 251(c)(2)(D).
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> 315. The duty to provide unbundled network elements on "terms, and conditions that are just, reasonable, and nondiscriminatory" means, at a minimum, that whatever those terms and conditions are, they must be offered equally to all requesting carriers, and where applicable, they must be equal to the terms and conditions under which the incumbent LEC provisions such elements to itself. We also conclude that, because section 251(c)(3) includes the terms "just" and "reasonable," this duty encompasses more than the obligation to treat carriers equally. Interpreting these terms in light of the 1996 Act's goal of promoting local exchange competition, and the benefits inherent in such competition, we conclude that these terms require incumbent LECs to provide unbundled elements under terms and conditions that would provide an efficient competitor with a meaningful opportunity to compete. Such terms and conditions should serve to promote fair and efficient competition. This means, for example, that incumbent LECs may not provision unbundled elements that are inferior in quality to what the incumbent provides itself because this would likely deny an efficient competitor a meaningful opportunity to compete. We reach this conclusion because providing new entrants, including small entities, with a meaningful opportunity to compete is a necessary precondition to obtaining the benefits that the opening of local exchange markets to competition is designed to achieve.
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> 316. As is more fully discussed below, to enable new entrants, including small entities, to share the economies of scale, scope, and density within the incumbent LECs' networks, we conclude that incumbent LECs must

> provide carriers purchasing access to unbundled network elements with the pre-ordering, ordering, provisioning, maintenance and repair, and billing functions of the incumbent LECs operations support systems. Moreover, the incumbent must provide access to these functions under the same terms and conditions that they provide these services to themselves or their customers.

McLeod, Ovation, MCI WorldCom, and Allegiance offer as further support for this position paragraph 279 from the FCC's order in In re Application of Bell Atlantic New York for Authorization Under Section 271 of the Communications Act of 1996, CC Docket 99-295, FCC 99-404 (December 22, 1999). Paragraph 279 states:

> As noted above, in the past we have evaluated whether a BOC is meeting its nondiscrimination obligation with respect to loops by examining whether loops are provided in a fashion that provides an efficient competitor a meaningful opportunity to compete. In this application, however, we note that the New York Commission adopted a retail analogue for new unbundled loops, and Bell Atlantic submitted accompanying data with which we can conduct a direct parity comparison. Because this retail analogue was developed as a result of the rigorous collaborative process described above, we find this means of comparison to be reasonable in this instance. We therefore conclude that Bell Atlantic must satisfy its duty of nondiscrimination by demonstrating that it provisions new unbundled local loops to competing carriers in substantially the same time and manner as it does to its retail customer. Because the New York Commission did not identify a retail analogue to the coordinated cutover of an active loop, i.e., a "hot cut," however, we will examine Bell Atlantic's provision of hot cuts in terms of whether its performance affords competitors a meaningful opportunity to compete. We also discuss separately Bell Atlantic's evidence regarding its performance with respect to xDSL loops, describing how we will consider such evidence in evaluating future applications filed under section 271.

The four CLECs state that this order disproves Ameritech's contention that the FCC does not believe that retail service and unbundled loops can be compared.

Moreover, McLeod, Ovation, MCI WorldCom, and Allegiance assert that the portion of the order from the Ameritech Michigan 271 proceeding upon which Ameritech relies related to the provision of operational support services ("OSS") for ordering and provisioning unbundled elements. They report that the FCC concluded at paragraph 141 that certain OSS functions have no retail analogue.[54] The conclusion that OSS

[54]McLeod, Ovation, MCI WorldCom, and Allegiance contend that Ameritech fails to point out that the FCC found that certain OSS functions have a retail analogue. At paragraph 140 they note that the FCC stated as follows: "We find that OSS functions associated with pre-ordering, ordering and provisioning for resale services, and repair and maintenance for both resale services and bundled network elements all

may have no "retail analogue" comparable to the activity of ordering an unbundled loop is far different from concluding there is no retail analogue in terms of assessing special construction charges, according to McLeod, Ovation, MCI WorldCom, and Allegiance.

Mr. Starkey also responds to Mr. Suthers' argument that Ameritech is required only to provide access to UNEs in a way that provides CLECs a "meaningful opportunity to compete." First, Mr. Starkey states that it is important to note that all of the cites Mr. Suthers makes to the FCC's orders in the BellSouth Louisiana 271 proceeding and the Ameritech Michigan 271 proceeding deal with provisioning intervals, not with the rates or terms under which UNEs will be provided. In both the BellSouth Louisiana and Ameritech Michigan orders, wherein the FCC first introduced the concept that a "retail analogue" may not exist for some UNEs, Mr. Starkey contends that the FCC was struggling with the task of comparing provisioning intervals for providing access to specific UNEs. As an example, he states that in the BellSouth 271 application it appeared that BellSouth did not provision, on a retail basis, access to certain UNEs independently. Hence, there was no information by which to compare BellSouth's retail provisioning timeframes for access to these elements (i.e., retail performance benchmarks) with its timeframes for offering access to these elements on an unbundled basis so as to ensure parity treatment, according to Mr. Starkey. That circumstance, he asserts, is very different from Mr. Suthers use of this language (i.e., "no retail analogue") to suggest that the provision of a loop as a Network Element (either in combination with other Network Elements in the provision of a retail service, or, in the provision of direct access via an unbundled loop) has no comparative retail analogue for purposes of gauging equivalent rates, terms, and conditions. Since Ameritech does use its loop facilities (i.e., a Network Element) to provision both retail services and direct, unbundled access, Mr. Starkey avers that there is a retail analogue.

Second, Mr. Starkey relates that the FCC, in paragraph 491 of its UNE Remand Order, clarified its contention that ILECs must provide access to UNEs in a manner that allows its interconnecting carriers a "meaningful opportunity to compete:"

> In those situations where an incumbent LEC does not provide access to network elements to itself, we reaffirm our requirement that incumbent LECs must provide access in a manner that provides a requesting carrier with a meaningful opportunity to compete. Because we believe that the technical infeasibility problem will arise rarely, we expect incumbent LECs to fulfill the non-discrimination requirement in nearly all instances where they provision unbundled network elements. In the rare instances where technical feasibility issues arise, incumbent LECs must prove to a state commission that it is technically infeasible to provide access to unbundled

have retail analogues. Similarly, because measuring daily customer usage for billing purposes requires essentially the same OSS functions for both competing carriers and incumbent LECs, equivalent access is the standard required by section 271 and section 251 of the Act for this billing subfunction as well." If this decision has any relevance whatsoever, the four CLECs maintain that it disproves Ameritech's point.

elements at the same level of quality that the incumbent LEC provides to itself.

Mr. Starkey states that it is important to note, consistent with the above discussion, that the FCC suggests its "meaningful opportunity to compete" standard applies only when "an incumbent LEC does not provide access to network elements to itself..." He insists that Ameritech uses its loop facilities (i.e., a Network Element) to provision service to itself and its retail customers in addition to providing access to that element on an unbundled basis. Therefore, Mr. Starkey asserts that Ameritech has an obligation to provide non-discriminatory access to particular Network Elements, not simply to provide access sufficient to provide CLECs a meaningful opportunity to compete.

Ameritech, the four CLECs further claim, goes to great lengths to draw a distinction between CLECs and its retail customers in an attempt to justify the special construction charges it assesses CLECs for UNEs. They contend that just as Ameritech did in Docket No. 99-0525, it admits that it treats CLECs and its own retail customers differently when it comes to special construction charges; but attempts to mitigate the differences by claiming that the costs of special construction are in fact recovered from both groups, just in different ways. In their view, Ameritech's position appears to be that retail special construction costs are reflected in its "residual costs," which it claims are recovered from retail customers through "contribution" generated by all retail offerings. Based on its assertion regarding its recovery of the residual "costs," McLeod, Ovation, MCI WorldCom, and Allegiance state that Ameritech infers that it does not discriminate when it assesses CLECs special construction charges for UNEs but does not assess such charges to its own retail customers when Ameritech provides services to those customers using the same network elements that CLECs utilize to provide services to those same customers. The record, they argue, demonstrates that the residual argument is wholly without merit – that it is nothing more than an attempt by Ameritech to divert attention from the clear discrimination it engages in through its policy of assessing CLECs special construction charges but not its own retail customers.

The residual, McLeod, Ovation, MCI WorldCom, and Allegiance assert, is irrelevant to this proceeding and should be ignored by the Commission. They claim that the residual is not a relevant economic concept, but is instead an Ameritech construct dating back to its first alternative regulation proceeding before this Commission. The residual, they argue, is simply the difference between Ameritech's original revenue requirement from a previous rate-of-return calculation (from the early 1990s) and the long run service incremental costs (plus joint and common costs) of the services it produces. They emphasize that the residual is not a cost of doing business nor is it in any way definable as an economic cost that is reasonably recovered from Ameritech's customers (either retail or CLEC customers). The residual, they contend, is simply a mathematical construct of Ameritech wherein it has, on numerous occasions, asked the Commission to "make it whole" in relation to some historic revenue requirement figure.

The four CLECs contend that the fundamental problem is that the revenue requirement figure used by Ameritech to determine its residual is nearly eight years old and is not a relevant number by which to compare the costs Ameritech incurs today. Additionally, they state that Ameritech has agreed to an alternative form of-regulation wherein its prices, not its underlying costs as represented by a revenue requirement, are used to restrain its monopoly power. They argue that Ameritech's attempt to maintain its current alternative regulation prices (without a review of its profitability) yet still maintain its residual as a purportedly relevant economic measure, by which its costs should be measured, is contradictory and self-serving.

Contrary to Ameritech's argument, McLeod, Ovation, MCI WorldCom, and Allegiance contend that the residual does not incorporate the costs of the activities Ameritech is attempting to recover via special construction charges. They assert that the Commission has rejected the residual as a relevant factor in setting rates (either retail or wholesale) in Illinois. Both the TELRIC methodology employed to determine rates for interconnection and UNEs, and the LRSIC methodology used to determine retail rates, according to McLeod, Ovation, MCI WorldCom, and Allegiance, prohibit the reliance on historic costs. They insist that both require the use of forward looking, least cost assumptions. They further argue that to the extent the costs of the activities Mr. Florence describes in his testimony are forward-looking direct economic costs of UNEs sold to interconnectors, those costs should be, and are, included in the direct TELRIC costs (and prices) for those UNEs. They contend such costs are not, nor would it be appropriate to include them, in a residual. They aver the Commission agreed with this principle in Docket Nos. 96-0486/0569 (Consolidated), where it rejected Ameritech's attempt to include "residual costs" in the prices for UNEs. McLeod, Ovation, MCI WorldCom, and Allegiance argue that just as the Commission recognized in those consolidated dockets, there is no place for recovery of a residual in cost based UNE rates; and the alternative form of regulation that Ameritech opted for long ago severed the link between costs and prices, and threw out constructs of traditional rate of return regulation and reliance on historical costs. They claim that Ameritech's concept of the "residual" is inconsistent with the TELRIC and LRSIC methodologies and Ameritech's alternative form of regulation.

Moreover, the Commission's cost of service rules, according to the four CLECs, do not recognize nor provide for recovery of a "residual revenue requirement." They relate that nowhere is the term "residual" even mentioned in Part 791. The assert that when it adopted its cost of service rules, the Commission rejected the suggestion that the residual revenue requirement be included in the aggregate revenue tests that Ameritech must submit to demonstrate that its competitive services are not being subsidized by non-competitive services. By refusing to allow the residual revenue requirement to be allocated between competitive and non-competitive services, the four parties argue that the Commission rejected the inclusion of the residual revenue requirement in its cost of service rules and, in turn, the recovery by Ameritech of any "costs" that the residual revenue requirement purportedly reflects. McLeod, Ovation, MCI WorldCom, and Allegiance state that the generic proceeding, Docket No. 96-0094, that the Commission initiated to investigate the source and appropriate treatment of those embedded costs, which they characterize in this docket as comprising the "residual revenue requirement," never resulted in a final Commission order because it was dismissed at the request of Ameritech.

McLeod, Ovation, MCI WorldCom, and Allegiance assert that Ameritech attempts to attribute its discriminatory practices with respect to special construction to rate design differences between CLEC and retail customers. There is nothing in the record of this proceeding, they claim, that would justify a change from the Commission's findings in Docket No. 99-0525. They insist that the residual is still not relevant, there is no evidence that special construction costs are reflected in the alleged residual, and even if there were any merit to the residual argument it would not excuse Ameritech's discriminatory application of special construction charges.

With regard to the proper interim loop conditioning rate, Mr. Starkey contends that the FCC's primary objective in implementing the merger condition concerning TELRIC based loop conditioning charges was to protect carriers from SBC/Ameritech's inherent incentive to overestimate line conditioning charges and thereby successfully erect barriers to the exploding advanced services marketplace. Allowing Ameritech to charge carriers unsupervised special construction charges for line conditioning, in the interim between now and the timeframe within which Ameritech must provide a line conditioning cost study, is not congruent with this objective, according to Mr. Starkey.

As indicated above, while CLECs wait for the Commission to approve final loop conditioning rates, Mr. Starkey recommends that the Commission adopt as interim rates the rates approved in Texas by the PUCT in Docket Nos. 20226 and 20272. Because CLECs have the right to avail themselves of the charges detailed above, Mr. Starkey states that the Commission should, in this proceeding, find that Ameritech can, at a maximum, assess the charges approved in Docket Nos. 20226 and 20272 until it receives approval from this Commission of a cost study supporting any line conditioning charges. He adds, however, that these charges should not be assessed as special construction charges at Ameritech's discretion.

As for the up-front nature of Ameritech's special construction charges, Mr. Starkey maintains that up-front charges have certain economic and public policy ramifications as opposed to recovering special construction expenses over the economic life of a facility. To the extent possible, he argues that special construction charges should be recovered via monthly recurring, TELRIC based rates. If Ameritech believes it is incurring costs for which it is not being compensated via its current TELRIC based rates, Mr. Starkey asserts that its appropriate avenue of recourse is to conduct an unbundled loop study that includes those costs and submit that study to the Commission for approval. To the extent special construction activities concern adjustments to the Ameritech network for purposes of supporting either unbundled loops or retail loops, he insists that those expenses must be recovered from all the parties that may use that facility over the facility's economic life. The only way to ensure recovery in this economically rational fashion is to include the costs of those adjustments in a properly fashioned TELRIC study, according to Mr. Starkey. He states that Ameritech's current process of charging the entirety of the expense to the "first man in" penalizes the first CLEC who encounters a facility, or a portion of the Ameritech network, that must be refashioned. And, to the extent the first CLEC must relinquish the facility for whatever reason in a timeframe shorter than the economic life of the facility (for example, if the customer chooses another carrier), Mr. Starkey asserts that this process leaves Ameritech with a more efficient, more robust network to be used to serve other carriers and customers at the original CLEC's expense. Mr. Starkey maintains that neither of these outcomes is conducive to economically efficient cost recovery or good public policy.

Finally, McLeod, Ovation, MCI WorldCom, and Allegiance question Ameritech's suggestion that its affiliate, AADS, faces the same special construction charges from Ameritech as CLECs. They report that the Commission prohibited AADS from engaging in discrimination by imposing the following condition in granting its Certificate of Service Authority: "AADS shall not sell or provide any services pursuant to any expanded certificate authority received in this docket to any customer or end-user at a price lower than AADS' costs, including the costs of any service components utilized, to provide said services to that customer or end-user." (Docket No. 94-0308, August 16, 1995, p. 6) Thus, the four CLECs insist that Ameritech can not claim that it charges AADS special construction charges which AADS can then absorb at its discretion since it must pass those costs on to end use customers.

1. Impact of Ameritech's policies on McLeod and Ovation specifically

McLeod and Ovation witness Jennings agrees with Staff and Mr. Starkey that it is proper to compare Ameritech's provision of UNEs to CLECs to its provision of retail service to its end use customers. Since both Ameritech and the CLEC are attempting to compete for end users, Mr. Jennings states that the only appropriate comparison is from the perspective of the end user. As a result of being assessed special construction charges by Ameritech, Mr. Jennings testifies that McLeod has decided not to serve customers it otherwise would serve. For those customers McLeod decides to serve, he claims that it is forced to absorb a much higher cost of providing service than would otherwise be the case. Mr. Jennings does not believe that this is a fair or reasonable result, and clearly puts McLeod at a disadvantage relative to Ameritech. If Ameritech is permitted to continue its practice of materially increasing the cost of securing UNEs through special construction charges, he claims that McLeod will have to seriously reconsider the economics of further expanding its facilities-based services using UNEs to its small and medium business and residential customer base. McLeod simply can not compete with Ameritech if McLeod is forced to absorb charges that Ameritech does not itself charge at retail for the same service, according to Mr. Jennings.

Mr. Jennings adds that the material impact on the economic viability of facilities-based services to a large portion of McLeod's customer base in conjunction with the delays caused by Ameritech's special construction practices, has prevented McLeod from moving a large portion of its resold customer base to its own facilities-based service. He contends that McLeod is thus unable to realize improved margins for that portion of its customer base that must remain on resold Centrex service. He argues that this results in Ameritech retaining that much more control over how McLeod provides service to its customers; which clearly impedes competition.

Other anti-competitive results flow from Ameritech's conduct, according to Mr. Jennings. As an example, he testifies that McLeod is unable to expand its product offering since Ameritech has been unwilling to expand the features and functionalities of its Centrex product offering. Specifically, over the past three years, Mr. Jennings states that McLeod has requested that Ameritech add a Caller ID with name feature to Centrex service to enable McLeod to offer such services to its resold customer base. Mr. Jennings relates that Ameritech has refused to do so. In contrast, he reports that US West implicitly recognized this issue and made such functionality available with Centrex service. Mr. Jennings characterizes Ameritech's unwillingness to do so as not being in the spirit of fair competition. He further claims that Ameritech's refusal to add this functionality to Centrex has resulted in the loss of both existing customers and prospects to Ameritech, and has adversely impacted McLeod's competitiveness. Mr. Jennings explains that the reason this problem is relevant to this proceeding is that McLeod could offer this functionality to its end users if it could provision service to them on a facilities-basis. McLeod can not do so, however, because of Ameritech's special construction charge policy, according to Mr. Jennings.

Mr. Jennings also testifies that McLeod can not pass through to customers special construction charges and remain competitive. Given the choice of paying nothing to remain on Ameritech's service, or paying a very large up front cost to obtain service from McLeod, Mr. Jennings states that virtually every customer will choose to remain with Ameritech if McLeod attempts to pass on such costs. In areas in which McLeod competes with additional providers, he indicates that all competitors are effectively forced to direct their sales activities at the very largest telecommunications customers, for whom it may make some economic sense for a competitor to absorb the cost of special construction charges in order to obtain the end user's business. Ameritech's special construction policy is also forcing McLeod to become a "cherry picker," according to Mr. Jennings, by narrowly limiting the types of customers to whom it markets competitive services -- a result that is obviously at odds with the pro-competitive legislation adopted in Illinois and by Congress

Nor do Ameritech's practices give McLeod a meaningful opportunity to compete with Ameritech, according to Mr. Jennings. He argues that the fact that Ameritech has the financial strength to absorb such costs does not justify imposing such special construction charges on CLECs. If Ameritech were allowed to continue doing so, Mr.

Jennings fears that the result will be that only large, well-heeled competitors such as AT&T and MCI WorldCom will have a meaningful opportunity to compete. He maintains that smaller entities like McLeod simply will not be able to absorb these costs to the extent the industry behemoths can and still remain financially viable. Mr. Jennings avers that Congress clearly did not intend competition to be limited to a very few, large entrants.

As shown on McLeod Exhibit 1.3, Mr. Jennings testifies that a small percentage of orders have been impacted by Ameritech's special construction policy. However, if Ameritech's policy is not changed, he insists that this percentage will increase for two reasons. First, he states that McLeod is moving towards more facilities-based resale as the basis for provisioning local service. Second, and more important, Ameritech's existing inventory of spare copper loops is being depleted, according to Mr. Jennings. Once that occurs, he contends that every customer served by IDLC will require disintegration of the DLC before it can take service from a CLEC via an unbundled loop. As more customers move to CLECs providing service via unbundled loops, he testifies that this problem will become worse. Furthermore, Mr. Jennings asserts that Ameritech's reluctance to proactively plan for unbundled loop demand will exacerbate this problem in the absence of a change in its special construction charge policy

Mr. Jennings offers several specific examples which he claims demonstrate that Ameritech imposes special construction charges on McLeod when it does not impose like charges on its retail end use customers. In the instance of item No. 148 on Proprietary Attachment 9 to Staff Ex. 2.0, Mr. Jennings states that Ameritech charged special construction because it claimed it had to dispatch a technician to perform an activity described as "Dpro recovery of defective pairs." Mr. Jennings asserts that such a dispatch occurs where the only pairs in a cable are defective for some reason (shorts, ground, etc.) and the pair must be repaired before connection. In the past, he testifies that this process was routinely done by Ameritech to serve its retail customers, and indeed, replacement of defective pairs should be accomplished as part of Ameritech's maintenance routine. He claims that it is unlikely that a retail customer of Ameritech would be charged special construction for recovery of a defective pair before installation of service. Similarly, under item No. 104 on Proprietary Attachment 9 to Staff Ex. 2.0, Ameritech allegedly required additional cable to be placed and spliced for the unbundled loops to be provided. Mr. Jennings states that it is his experience that this type of work is typically done for a retail customer without charging for special construction. He testifies that installing additional cable and splicing that cable is part and parcel of provisioning of local service to a retail customer. Mr. Jennings also indicates that Ameritech no longer assesses up-front charges for this type of construction work. Mr. Jennings bases his conclusions that Ameritech would not charge retail customers for these activities upon his experience with Ameritech and Illinois Consolidated Telephone Company ("ICTC"), the incumbent local exchange carrier in East Central Illinois and a subsidiary of Consolidated Communications, Inc. ("CCI"). CCI merged with McLeod in September of 1997. In addition, his opinion is supported by his understanding of the application of Ameritech's special construction tariff on retail customers, as explained by Mr. Starkey.

Mr. Jennings is also aware of at least three customers that Ameritech served without requiring payment of special construction charges after McLeod refused service as a result of Ameritech's effort to collect special construction charges for loops to serve the same customer. The first instance concerns item No. 188 on Proprietary Attachment 9 to Staff Ex. 2.0. McLeod placed an order for Illini Pella Inc at 1001 N. County Fair Drive in Champaign. Ameritech quoted special construction charges of $3,787.71 to construct what is described as "an entrance cable network interface and pad for new building" related to the provisioning of seven lines. Mr. Jennings testifies that McLeod declined to pay the charges but that Ameritech's retail unit subsequently marketed the same service to Illini Pella and Ameritech agreed to provide the facilities without assessing any special construction charges.

The second example regards item No. 160 on Proprietary Attachment 9 to Staff Ex. 2.0. Mr. Jennings states that in late 1997, Doug Dalby requested ISDN service from McLeod at his home at 1050 Hillcrest Drive, Decatur, Illinois. To provision such service, McLeod ordered an unbundled ISDN loop from Ameritech. According to Mr. Jennings, Ameritech informed McLeod that special construction charges totaling $5,027.05 would be required for equipment and labor to condition a loop for ISDN to the customer's address. He states that McLeod declined to pay the charges, and service was not installed for the customer. Immediately thereafter, Mr. Jennings reports that the customer ordered ISDN directly from Ameritech's retail business unit. He testifies that Ameritech did not mention special construction charges to the customer and installed Ameritech's ISDN service; charging the standard non-recurring charge for service installation and nothing more. Mr. Jennings also discloses that Mr. Dalby was an employee of Consolidated Communications Telecom Services ("CCTS") at the time he requested service. CCTS is a subsidiary of CCI. He asserts, however, that Mr. Dalby's order for ISDN service was precipitated by his personal desire for such service, and was not intended to catch Ameritech in a bad act. Mr. Dalby retained his ISDN service from Ameritech until he moved to a new location in August 1999.

After inquiring why Ameritech sought to assess special construction charges on McLeod but did not charge Mr. Dalby for special construction, Mr. Jennings testifies that Ameritech's Vice President-Sales/Service explained that Ameritech's retail operations simply chose not to pass those costs on to the retail customer. Mr. Jennings argues that Ameritech's response fails to justify its conduct. He insists that Ameritech has an obligation to provide access to competitors to UNEs under the same terms and conditions such services are made available to its retail customers. He further asserts that Ameritech is required to provide non-discriminatory service to all of its customers. Mr. Jennings maintains that Ameritech is failing to meet these obligations.

Item No. 156 on Proprietary Attachment 9 to Staff Ex. 2.0 represents the third example. In July of 1999, Mr. Jennings claims that Design Tuscano requested ISDN service from Ovation at its business address, 1645 Green Leaf, Elk Grove Village, Illinois. To provision such service, Ovation ordered two unbundled ISDN loops from Ameritech. Mr. Jennings asserts that Ameritech informed Ovation that special construction charges totaling $7,664.00 would be required for equipment and labor to condition the two loops for ISDN to the customer's address. He states that Ovation declined to pay the charges, and service was not installed for the customer. Immediately thereafter, Mr. Jennings testifies that the customer ordered ISDN directly from Ameritech's retail business unit. Again, Ameritech did not mention special construction charges to the customer, and instead simply installed ISDN service; charging only the standard non-recurring charge for service installation, according to Mr Jennings.

Mr. Jennings testifies that other impacts resulting from Ameritech's special construction policy include lost customer prospects simply because of the delay in resolving the special construction issue. He claims that this is particularly so given that the customer does not incur such delays if it orders service from Ameritech. Ameritech's process related to special construction charges provides it a very significant advantage in the marketplace, since many customers place a very high priority on obtaining service in the shortest amount of time, according to Mr. Jennings.

D. Rhythms and Covad's Position

In their joint Initial Brief, Rhythms and Covad point to paragraphs 218, 315, and 316 of the FCC's First Report and Order for the proposition that Ameritech must provide CLECs access to UNEs on the same rates, terms, and conditions that it provides such access to itself, not simply in the same manner that it provides access to other CLECs. They also cite paragraph 279 of the FCC's order in the Bell Atlantic New York 271 proceeding, just as McLeod, Ovation, MCI WorldCom, and Allegiance do. Rhythms and Covad rely on Section 13-505.2 of the Act as well to support their position that Ameritech's special construction policy discriminates against CLECs.

Rhythms and Covad also urge the Commission to reject Ameritech's argument that it recovers special construction costs from its retail customers through the residual. They support Mr. Starkey's position that the residual is irrelevant to this proceeding. In particular, they add that Ameritech has failed to show that it recovers the cost of loop conditioning for its retail customers through contribution to the residual.

To the extent that Ameritech's services are competitive (such as ISDN Prime and ISDN Direct in MSA 1), Rhythms and Covad assert that Ameritech must comply with Section 13-502(c) of the Act. This section imposes a price floor on competitive services equal to LRSIC. They argue that the record shows that Ameritech frequently tells xDSL providers it will cost thousands of dollars to condition loops – loops it then turns around and conditions for free for its own ISDN customers. If loop conditioning is a long-run incremental cost, as claimed by Ameritech in this proceeding, then this section of the Act does not allow Ameritech to provide ISDN customers with free loop conditioning, according to Rhythms and Covad. Nor, they continue, does this section of the Act allow Ameritech to recover those costs from its residual revenue requirement; it must recover those costs from ISDN customers.

Rhythms and Covad maintain that either loop conditioning is a long-run incremental cost that must be recovered from DSL providers and Ameritech's own ISDN customers, or loop conditioning is not an element of a proper LRSIC study or TELRIC study and it must therefore be provided without charge to both its own ISDN customers and to xDSL providers. They insist that as a company providing services subject to Section 13-502(c) of the Act, Ameritech is not, as it claims in its Initial Brief, "free to make choices about how to recover those costs." If loop conditioning is indeed a cost that can be recovered from xDSL providers, Rhythms and Covad assert that it is a cost that must be recovered directly from ISDN customers as well.

Rhythms and Covad also take issue with Ameritech's argument that its up-front charges are an appropriate method of recovering its costs because it incurs its loop conditioning and IDLC/RSU unbundling costs up-front. They contend that Ameritech's position is without merit for three reasons. First, they assert that Ameritech improperly assumes that its alleged up-front costs related to conditioning and IDLC/RSU unbundling must be recovered up-front. Contrary to Ameritech's assertion, the two CLECs state that there is no requirement that "up-front" costs be recovered up-front; the fact that Ameritech may prefer to do so is not dispositive. Instead, Rhythms and Covad assert that the critical issue is whether such up-front charges can be a barrier to competition. They claim that federal law recognizes that up-front charges are a barrier to a CLEC seeking to offer a competitive service, and to avoid such a result, allows nonrecurring costs to be recovered through recurring charges over a reasonable period of time. (47 C.F.R. § 51.507(e)) Thus, if this Commission allows Ameritech to impose special construction charges on CLECs, Rhythms and Covad maintain that the Commission should ensure that nonrecurring costs do not serve as a barrier to competition in Illinois and require Ameritech instead to recover those costs through its recurring rates over a reasonable period of time.

The two CLECs further contend that Ameritech's statement that it and CLECs are similarly situated with respect to investment decisions is not credible. Ignoring market realities, Ameritech maintains that, just like Ameritech, CLECs can spread their up-front costs over customers and time, according to Rhythms and Covad. In response, they argue that it is one thing for a profitable company like Ameritech to spread its costs over millions of customers throughout the state; but it is quite another for a young CLEC such as Rhythms or Covad (who allegedly make no profit) to spread the same costs over a thousand customers.

The third reason that up-front charges are not appropriate, according to Rhythms and Covad, is that there is no support for Ameritech's conclusion that some

CLECs should make the "efficient" decision to select resale over providing service through UNEs. They note that Ameritech maintains that its excessive up-front charges send the right "price signal" and provide CLECs with the proper economic incentives regarding use of resale. Perhaps, not surprisingly they contend, Ameritech prefers the "economic incentive" that ensures that CLECs will opt-for resale (a more profitable option for Ameritech) than purchasing UNEs. They counter, however, that Ameritech's preference is irrelevant. Rhythms and Covad state that the TA96 was intended to ensure that consumers would have a real choice among telecommunications carriers – not simply a choice among 15 carriers offering Ameritech's resold services. They recount that the FCC echoed this sentiment in paragraph 68 of its UNE Remand Order, "... [c]arriers using unbundled elements will have greater opportunities to offer services that are different from those services offered by the incumbents. More specifically, carriers reselling incumbent LEC services are limited to offering the same service an incumbent LEC offers at retail."

1. Impact of Ameritech's policies on Rhythms specifically

Rhythms witness Lopez testifies that Ameritech's imposition of special construction charges has impacted Rhythms' operations. She indicates that Rhythms has canceled unbundled loop orders to Ameritech on hundreds of occasions because of special construction and conditioning charges. Ms. Lopez states that generally, the charges imposed by Ameritech have been too high to be recovered in a retail service over predictable service lives. In some instances, she claims that Ameritech's charges have ranged as high as $360,000 for a single loop. While it is difficult for Rhythms to estimate monthly revenue for each customer due to the variety of services offered, she relates that generally the price of Rhythms' services range between $120 and $1,195 per month for business consumers, depending upon the speed of the service. Ms. Lopez adds that Rhythms has additional price points for general consumers which are competitive with ILECs' DSL services. She further testifies that Rhythms' data shows that nearly 20% of the unbundled loops ordered by Rhythms since July of 1999 have been impacted by special construction charges or have been denied and referred to Ameritech's BFR process. By comparison, she notes that the percentage of lines impacted by special construction charges in the BRE complaint before the MPSC was slightly more than 1%.

All customers, Ms. Lopez testifies, have a minimum set of expectations when requesting service from a carrier: to receive the requested service, to be charged a reasonable amount for that service, and to receive the service in a timely manner. She indicates that Ameritech's process and procedures for assessing special construction charges make it difficult for Rhythms to satisfy any of these expectations when providing service in Illinois. Additionally, she notes that while Ameritech is in control of the process, any delay to the customer is reflected on Rhythms and its ability to provide service.

Ms. Lopez claims that Ameritech's policy frequently causes Rhythms to deny service or provide a slower type of DSL service than requested by the customer. While the customer may elect to pay the special construction charges itself, she states that this may mean several thousand dollars (or more) of up-front charges that the customer did not anticipate. Similarly, if the customer is served by an integrated DLC that Ameritech claims can not be unbundled or Ameritech cancels the order because no unbundled facilities are available, Ms. Lopez asserts that Rhythms will not be able to provide service unless it submits a BFR and pays significant special construction charges for the construction of an unbundled facility. If the customer is not eligible for DSL service from Ameritech, it may be denied access to DSL service altogether, according to Ms. Lopez. In many other cases, she testifies that Ameritech has informed Rhythms after it ordered an ADSL loop that it would have to order an ISDN loop, because the loop is longer than 18,000 feet, an arbitrary length imposed by Ameritech for it's definition of ADSL. Although the customer can still receive ADSL service from Rhythms in this situation, Ms. Lopez indicates that the customer will receive a slower DSL service than originally anticipated, which is likely to disappoint the customer.

Even if Rhythms elects to pay the special construction charges assessed by Ameritech, Ms. Lopez maintains that provision of service to the customer generally will be delayed. She testifies that Rhythms generally learns *after* Ameritech provides a firm order date that a customer's order will be delayed because of the alleged need for special construction. Such work usually causes Rhythms to miss the date that it has promised to provide DSL service to the customer, according to Ms. Lopez. In such cases, she contends that the customer is likely to blame Rhythms, rather than Ameritech, for the missed deadline. She indicates that Rhythms has requested Ameritech to provide special construction on shorter intervals but that Ameritech refuses to establish a time guideline for the most frequent special construction and instead leaves the construction time frame up to each individual field engineer.

2. Impact of Ameritech's policies on Covad specifically

Covad witness Evans agrees that Ameritech should, at most, only assess special construction charges to Covad and other CLECs when it would also impose special construction charges on it own retail end user under its tariff. Ms. Evans testifies that Covad continues to receive substantial construction charges for xDSL loop conditioning. In contrast to Texas where SWBT now charges Covad less than $50 to condition a loop that is less than 18,000 feet in length, she avers that Ameritech continues to impose several thousands of dollars in special construction charges simply to remove load coils or excessive bridged taps. Ms. Evans maintains that Ameritech's policy artificially limits Covad's access to unbundled loops and thus has prohibited Covad from providing DSL service to numerous customers in Illinois.

Covad has also observed recently a dramatic increase in the number of orders rejected by Ameritech because no spare pairs or facilities are available, according to Ms. Evans. For the seven-month period between May and December of 1999, she testifies that Covad received 160 notices from Ameritech canceling Covad's order because no spare pairs were available. In January 2000 alone, Ms. Evans states that Covad received 211 no spare pair notifications from Ameritech. She asserts that this surge in cancelled orders following Ameritech's special construction policy change concerns Covad. In her opinion, Ameritech has reclassified orders that previously would have fallen into the "special construction" category into the "no facilities available" category. In doing so, Ms. Evans states that Ameritech has effectively blocked Covad's access to those facilities. While in the past, Covad may have received inflated special construction charges to access the loop, she claims that Covad now has no ready means to access the loops that Ameritech labels "no spare pairs." At best, she indicates that Covad must submit a BFR to Ameritech in order to make the pair available. With a BFR, however, Ms. Evans laments that Covad has no assurance that Ameritech will in fact make those facilities available.

Like Rhythms, Covad is aware of instances where it was told special construction charges were necessary to serve an end user but that later the same end user obtained the same service from Ameritech without being assessed special construction charges. Ms. Evans identifies three situations where end users have been able to get an ISDN line from Ameritech at no extra charge even though Ameritech sought to impose several thousand dollars in special construction charges on Covad for the same loop. The first such example is represented by item No. 1379 on Proprietary Attachment 9 to Staff Ex. 2.0. Ms. Evans explains that on September 14, 1999, Merle Reitz placed an order with Covad for a DSL line. According to Mr. Reitz's affidavit, marked as VRE 1.8 and attached to Covad Ex. 1.0, Covad notified him on September 24, 1999 that Ameritech sought $1,431.61 in special construction charges for "removal of a bridged tap for 1 loop in Palatine wire center." Ms. Evans states that Covad cancelled the order due to the amount of special construction charges and resubmitted the order on October 20, 1999. Mr. Reitz states in his affidavit that this time Ameritech sought $1,996.72 in special construction charges to unload pairs and remove a bridged tap.[55] He adds that Covad did not approve the charges and the order was automatically cancelled within five days per Ameritech's policy. Subsequently, Mr. Reitz's affidavit indicates that he ordered an ISDN line direct from Ameritech; which was installed without the assessment of any special construction charges. He reports that the only charge he paid was a one-time installation fee of $145.00. Mr. Reitz's affidavit also indicates that he has been the Regional Transmission Manager for Covad since January of 1999.

Ms. Evans' second example concerns item No. 1710 on Proprietary Attachment 9 to Staff Ex. 2.0. She testifies that David Williamson placed an order through Covad for a DSL line. Ameritech notified Covad that $490.50 in special construction charges would be assessed for "cutting in pairs at the terminal," according to Ms. Evans. Subsequently, however, she claims that Mr. Williamson was advised by Ameritech that

[55] The second assessment of $1,996.72 does not appear on Proprietary Attachment 9 to Staff Ex. 2.0.

it could provide him with DSL service without any additional facilities or construction charges.[56]

The third example regards an order for DSL service placed with Covad by Peter Hamilton.[57] According to his affidavit, marked as VRE 1.10 and attached to Covad Ex. 1.0, Mr Hamilton placed his order on July 6, 1999. His affidavit indicates that he was later notified by Covad that Ameritech sought $2,300 in special construction charges to provision the necessary loop. After the five-day approval period lapsed, he states that Ameritech cancelled the order. Subsequently, Mr. Hamilton reports that he ordered an ISDN line direct from Ameritech; which was installed on July 22, 1999 without the assessment of any special construction charges. He asserts that he paid only Ameritech's standard $145.00 one-time installation fee. Mr. Hamilton's affidavit also states that since December of 1998, he has been the Manager of Field Operations for Covad.

Ms. Evans testifies that all digital services, including ISDN and DSL, require a "clean" copper loop; thus, in order to provision ISDN to the customers listed above, Ameritech had to "condition" the loop in the same manner as for a DSL loop. As these examples illustrate, she avers that Ameritech is discriminatorily charging CLECs "special construction" for conditioning that it does not charge its own retail customers in similar circumstances.

Moreover, she contends that Ameritech's special construction charges are not uniformly or consistently imposed. She adds that Ameritech's special construction charges often vary for the same loop order. In the case of Mr. Reitz, Ms. Evans observes that when Covad resubmitted Mr. Reitz's loop order, the special construction charges increased by $500. She further observes that Covad has received inconsistent charges for the same type of line conditioning and basic maintenance items. As an example, she states that Covad continues to receive charges varying from $797 to more than $7,000 for removal of load coils. Thus, Covad has no way to predict whether special construction on a loop order will be $184 or $102,000, according to Ms. Evans.

When informed of special construction charges, Ms. Evans asserts that a customer's typical response is to cancel their order with Covad. From late May 1999 to the present, she claims that approximately 80% of Covad's orders that had been assessed special construction charges were cancelled. According to Ms. Evans, Covad has been informed that several of those customers were subsequently contacted by Ameritech sales representatives and offered DSL service without any special construction charges. After speaking with Ameritech representatives, she continues, several customers called their internet service provider ("ISP") to inquire why Ameritech DSL would not involve any additional construction charges. Covad

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[56] Ms. Evans directs the Commission's attention to Client Order 100593 and Client Order log, marked as VRE 1.9 and attached to Covad Ex. 1.0.
[57] This order does not appear on Proprietary Attachment 9 to Staff Ex. 2.0.

believes that several customers may have opted for Ameritech's DSL service due to the substantial price differential created by the special construction charges imposed by Ameritech on Covad.

Ms. Evans testifies that Covad has been damaged by Ameritech's imposition of special construction charges in multiple ways. First, she states that Ameritech's practice of assessing special construction charges to provision loops makes it cost prohibitive for Covad to provide DSL services to a significant amount of Illinois customers requesting such service. As an example, she claims that Covad can not effectively compete if it must pay several thousands of dollars in special construction charges in order to obtain an unbundled loop that generates $50 a month in revenue. In addition, according to Ms. Evans, Ameritech's policy of automatically canceling a loop order if Covad does not approve the special construction charges within five days imposes additional processing costs for Covad. Because Covad must wait for its customer, the ISP, to notify in turn its customer (the end user) of the charges assessed, she reports that Covad often waits longer than five days to determine if the end user will accept the special construction charges. If the end user agrees to accept the charges, she states that the ISP then notifies Covad. By that time, Ms. Evans claims that Ameritech has typically cancelled the order because the five-day period has elapsed. Covad must then resubmit the order and begin the entire process again, according to Ms. Evans.

Moreover, in the past, Ms. Evans asserts that Covad often elected to resubmit select orders because the special construction charges imposed often varied for the same order. Thus, Covad would resubmit loop orders in the hope of receiving lower special construction charges, and in several cases was able to lower the charges so as to be able provide DSL service to the customer, according to Ms. Evans. She testifies that the additional costs incurred, however, by Covad from submitting the same order multiple times affects Covad's ability to compete and adversely impacts the deployment of advanced services in Illinois.

Covad contends that Ameritech's special construction policy has also substantially damaged its goodwill and reputation in the marketplace. Because Ameritech does not notify Covad that special construction charges will apply to an order until the firm order commitment date at the earliest, Ms. Evans relates that Covad has established an expectation with the customer that it will be able to provide DSL service at a fixed price. Covad, however, now finds itself frequently having to return to the customer to notify him that he must pay several additional thousands of dollars to obtain the promised DSL service, according to Ms. Evans. She testifies that few customers are able to understand why such charges appear several weeks after Covad initially accepted their order, and adds that many of those customers subsequently cancel their Covad DSL orders. Furthermore, Ms. Evans maintains that because Covad is a new company, it is still establishing its reputation in the marketplace. When it fails to provide service to one customer, she asserts that it risks losing not just that customer, but other customers who are deterred from ordering Covad service based on the experiences of their friends or colleagues.

E. Commission Conclusion

The first step in resolving the discrimination issue is to determine whether UNEs and retail services are comparable. According to Ameritech, UNEs and retail services are never comparable. The Commission disagrees. Ameritech cites Ameritech Michigan's and BellSouth's 271 proceedings for the proposition that the provisioning of UNEs has no retail analogue. In the paragraphs cited by Ameritech, the FCC identified certain OSS functions as having no retail analogue. The lack of a retail analogue for certain OSS functions may not be generalized to the point of concluding that UNEs and retail services are never comparable. The Commission also observes that Ameritech neglected to mention that in paragraph 140 of the Ameritech Michigan order the FCC found that certain OSS functions do in fact have retail analogues. The prior Commission orders cited by Ameritech, Docket Nos. 96-AB-003/004 and 98-0198, are also distinguishable as they are based on facts not before the Commission now. Moreover, as noted by McLeod, Ovation, MCI WorldCom, Allegiance, Rhythms, and Covad, the FCC again recently held in paragraph 279 of Bell Atlantic New York's 271 proceeding that under certain circumstances, UNEs have retail analogues. Therefore, as a general proposition, UNEs and retail services may be comparable.

With specific regard to the provisioning of conditioned loops, the only activity (among those identified in this proceeding) for which Ameritech may assess special construction charges, the Commission concludes that loop conditioning for CLECs has a retail analogue. The activities associated with loop conditioning, eg: removal of bridged taps and load coils, must be conducted in order to provision both ISDN and DSL services. Loop conditioning performed in conjunction with the provisioning of ISDN services by Ameritech is the retail analogue of loop conditioning performed in conjunction with the provisioning of DSL capable loops to CLECs. Hence, there is little difference between the provisioning of ISDN services and DSL capable loops.

The next step in the analysis is whether Ameritech's special construction policy as it concerns loop conditioning is discriminatory. Ameritech claims that it recovers its costs associated with loop conditioning performed for retail customers through the residual component of its retail rates. A portion of every Ameritech retail customer's rates includes an indiscernible component representing Ameritech's residual costs, according to Ameritech witness Florence. Under this approach to cost recovery, every Ameritech retail customer is in essence paying some amount to recover Ameritech's costs associated with the loop conditioning performed for only a few of its retail customers. When Ameritech conditions a loop for a CLEC, Ameritech assesses special construction charges on that particular CLEC since the TELRIC based rates it charges the CLEC for the loop do not include a residual component. Ameritech adds that it does not provide xDSL services, but that its affiliate which does offer such services, AADS, faces the same conditioning charges as CLECs. Since it is recovering its loop conditioning costs from both retail customers, its affiliate, and CLECs, Ameritech insists that there is no discrimination.

The Commission first concludes that Ameritech's "residual" is irrelevant under the alternative form of regulation that Ameritech now enjoys. Mr. Florence describes the residual as the gap between overall retail revenues and the sum of LRSIC rates plus shared and common costs. This type of revenue/cost comparison is more suited for a rate of return regime rather than Ameritech's current alternative regulation plan. Accordingly, Ameritech should recover its costs associated with loop conditioning for retail customers through explicit LRSIC based special construction charges.

Furthermore, Ameritech may not spread its retail loop conditioning costs among all retail customers, as it purports to have done through the residual, since to do so constitutes discrimination. Ameritech would have the Commission believe that so long as Ameritech provides UNEs to all CLECs, itself, and its affiliates on the same terms, it does not matter how Ameritech treats and recovers its costs from its retail end users for the same activity. This position can not be sustained since surely Congress did not intend, in enacting the TA96, to allow ILECs to structure their rates so that end users would always find a particular service to be cheaper if taken from the ILEC than an alternative provider in situations where that service is comparable as a UNE and retail service.

On the retail side, when a retail customer requests ISDN service, Ameritech would condition the loop without assessing an extra special construction charge since it claims that all retail customers would be contributing through their recurring rates to the recovery of that cost incurred on behalf of that one customer. The record includes at least five examples of instances where Ameritech provided ISDN service to end users without assessing special construction charges even though it had sought to assess such charges when a CLEC requested the appropriate UNE to provide an xDSL capable loop to the same customer. In contrast, under Ameritech's current policy, only after a CLEC negotiates a service agreement with an end user and requests a conditioned loop for that end user does the CLEC learn the amount of special construction charges for loop conditioning.

Ameritech's practices of assessing special construction charges allows a retail customer to obtain ISDN service directly from Ameritech without incurring special construction charges and, arguably, paying nothing for loop conditioning. As discussed above, because Ameritech is under an alternative regulation plan, the Commission rejects Ameritech's assertion that it is recovering loop conditioning charges from retail customers through the residual. Alternatively, Ameritech assesses up-front special construction charges on CLECs for loop conditioning. This is clearly disparate treatment which the Commission finds discriminatory.

Even if one assumed that Ameritech recovered loop conditioning costs from retail customers through the residual, its current special construction policies are discriminatory to CLECs. Recovering such loop conditioning special construction costs from all end users through recurring rates is difficult for a CLEC to do since Ameritech's loop conditioning charges vary dramatically from order to order. CLECs would be regularly updating their rates to accommodate for the unpredictable nature of Ameritech's special construction charges for loop conditioning. If the CLEC wants to avoid regular modifications to its rates and still recover this cost, its alternative is to seek an additional nonrecurring payment from its end user and risk losing the end user if he does not want to pay the extra amount representing the special construction charges. The end result is that end users would be more apt to take services requiring loop conditioning from Ameritech since they would not be assessed a separate special construction charge. Those taking service from a CLEC would either encounter an additional charge or fluctuating rates trying to accommodate for Ameritech's varying special construction charges.

The suggestion has also been made that it is questionable whether Ameritech does in fact charge its affiliate, AADS, for loop conditioning; and, if it does charge AADS, that AADS may then be deciding to absorb those conditioning special construction costs. Insufficient evidence exists to find that Ameritech has not imposed loop conditioning costs on AADS or that AADS has absorbed those costs. The Commission trusts, however, that AADS is aware of and is abiding by the conditions imposed by the Commission in Docket No. 94-0308; namely that AADS shall not sell or provide any services offered pursuant to any expanded certificate authority received in that docket to any customer or end user at a price lower than AADS' costs, including the costs of any service components utilized, to provide said services to that customer or end user.

With regard to Ameritech's "absurd results" argument, the Commission's finding that loop conditioning is comparable does not necessarily mean that the charge for conditioning provided for retail customers and the charge for CLECs have to be identical. Rates for UNEs are based on TELRIC studies while rates for retail services are based on LRSIC studies. So long as the costs studies are properly performed and the results are applied in a nondiscriminatory manner, charges for loop conditioning under the current cost study methodologies may be different without constituting discrimination.

As required by the FCC's order approving the merger of Ameritech and SBC, Ameritech has filed proposed TELRIC based loop conditioning charges. In the interim, however, Ameritech must make available to CLECs conditioning rates contained in any effective interconnection agreement to which an SBC/Ameritech ILEC is a party. Although the interim rates proposed by McLeod, Ovation, MCI WorldCom, and Allegiance, and later supported by Staff, Rhythms, and Covad, come from an interconnection agreement to which an SBC/Ameritech ILEC is a party (SWBT), Ameritech objects to including such rates in its tariff on grounds that the PUCT erred in setting the rates. Ameritech states that it will make the PUCT rates available to CLECs, but only after a CLEC and Ameritech negotiate revisions to their interconnection agreement reflecting such. In contrast, Ameritech is willing to modify its tariff to incorporate the higher loop conditioning rates found in the Ameritech/BroadSpan interconnection agreement, as initially recommended by Staff, without requiring a CLEC to negotiate revisions to its interconnection agreement reflecting the BroadSpan rates. Given the true up mechanism established in the FCC's order, however, Mr. Florence indicates that this issue is not of central long term importance to Ameritech.

In light of the true up mechanism, the Commission is puzzled as to why Ameritech is willing to modify its tariff to reflect the BroadSpan conditioning rates but opposes modifying its tariff to reflect the lower PUCT rates. Even if it is later found that the PUCT rates are too low, Ameritech would still be made whole through the true up mechanism. Moreover, requiring CLECs seeking to avail themselves of the PUCT rates to negotiate revisions to their interconnection agreements could render such negotiation efforts an exercise in futility since the length of negotiations could make interim rates moot if the Commission approves the final rates before approving the revisions to the interconnection agreement. The only conclusion that may be drawn from Ameritech's position is that it would prefer to collect the higher BroadSpan rates. Such is not sufficient justification for adopting Ameritech's position. Because (1) the conditioning rates adopted by the PUCT in Docket Nos. 20226 and 20272 satisfy the parameters of the FCC's merger order, (2) Ameritech is protected by the true up mechanism, and (3) modifying its tariff to incorporate the PUCT rates would be no more difficult for Ameritech than modifying its tariff to reflect the BroadSpan rates, the Commission concludes that Ameritech must make available to all CLECs as interim loop conditioning rates the rates approved by the PUCT in Docket Nos. 20226 and 20272 by modifying its tariff within five days of entry of this order.[58]

Given the nature of these loop conditioning charges, they may be collected from CLECs up-front so long as Ameritech imposes the same charges on its retail customers up-front. Since these charges are TELRIC based, however, Ameritech must file with the Commission LRSIC based loop conditioning charges to be assessed on retail customers within 90 days of entry of this order. The TELRIC based loop conditioning charges should be collected from retail customers until LRSIC based charges are available because otherwise Ameritech would be able to continue its discriminatory practices. Accordingly, Ameritech must also modify its tariff to reflect that its retail customers are to be charged the conditioning rates in the PUCT Docket Nos. 20226 and 20272 until LSRIC based loop conditioning charges are approved.

[58] Had it elected to adopt the higher BroadSpan rates, the Commission realizes that the true up mechanism would also protect those CLECs paying those rates. Because it is this Commission's policy, however, to support competition, the lower PUCT rates have been adopted since the higher BroadSpan rates may deter competition.

VIII. PREORDERING INFORMATION

Certain CLECs have also raised the issue of availability of preordering information. They contend that without sufficient preordering information they can not determine when a particular request for a UNE will result in special construction charges. They further state that Ameritech's possession of such information enables it to establish the correct customer expectation for service installation while CLECs can not do so since they lack comparable access to such information. Ameritech uses this information to its advantage, they argue, and withholds it from CLECs as a means of discriminating against them.

As a general matter, the Commission does not believe that this docket is the appropriate proceeding in which to establish parameters on preordering. To the extent that preordering relates to special construction, the Commission lacks sufficient information to determine what information should be available. In any event, the Commission finds that its definition of "available" and clarification of the tariff terms that govern available facilities should provide CLECs with a reasonable expectation of when special construction charges will be assessed.

IX. FINDING AND ORDERING PARAGRAPHS

The Commission, having considered the entire record, is of the opinion and finds that:

(1) Ameritech is a telecommunications carrier certificated to provide local exchange and intraMSA interexchange services in Illinois;

(2) the Commission has jurisdiction over the above-referenced parties and the subject matter hereof;

(3) the facts recited and conclusions reached in the prefatory portion of this Order are supported by the record herein and are hereby adopted as findings of fact and conclusions of law;

(4) certain charges assessed by Ameritech pursuant to its special construction policy constitute double recovery of costs;

(5) Ameritech's special construction policy discriminates against CLECs in the assessment of special construction charges for loop conditioning;

(6) Ameritech's tariff and special construction policy should be revised as described in the prefatory portion of this Order;

(7) within five days of entry of this Order, Ameritech should modify its special construction policy and file revised tariff sheets as described in Finding (6); and

(8) within 90 days of entry of this Order, Ameritech should file LRSIC based rates for loop conditioning to be applied to retail customers.

IT IS THEREFORE ORDERED by the Illinois Commerce Commission that Illinois Bell Telephone Company's special construction policy double recovers certain costs and discriminates against competitive local exchange carriers in the assessment of special construction charges for loop conditioning.

IT IS FURTHER ORDERED that Illinois Bell Telephone Company shall revise its tariff and special construction policy as set forth in Findings (6) and (7).

IT IS FURTHER ORDERED that Illinois Bell Telephone Company shall file LRSIC based rates for loop conditioning as described in Finding (8).

IT IS FURTHER ORDERED that any petitions, objections, or motions made in this proceeding that have not been specifically ruled upon are hereby disposed of in a manner consistent with the conclusions contained herein.

IT IS FURTHER ORDERED that subject to the provisions of Section 10-113 of the Public Utilities Act and 83 Ill. Adm. Code 200.880, this Order is final; it is not subject to the Administrative Review Law.

By order of the Commission this 15th day of August, 2000.

(SIGNED) RICHARD L. MATHIAS

Chairman

(S E A L)